United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7086

To be argued by
Edwin Longcope

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

ATLANTIC LINES LIMITED,

Plaintiff-Appellant,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Defendant-Appellee

On Appeal From An Order Of The United States District Court For The Southern District Of New York

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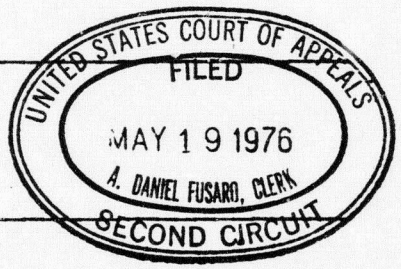
BRIEF FOR APPELLANT



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Defendant-Appellee. :

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

Plaintiff insured appeals from a decision of the United States District Court for the Southern District of New York dismissing its complaint and denying recovery to it on the Container and Chassis Insurance Policy issued by defendant. The opinion below of the Hon. Morris E. Lasker is not reported.

ISSUES PRESENTED FOR REVIEW

1. Was the loss suffered by the insured plaintiff within the broad coverage of the Container and Chassis Policy?

2. Did the plaintiff sustain its burden of proving that the loss was fortuitous?

STATEMENT OF THE CASE

Plaintiff Atlantic Lines Limited ("Atlantic") is the insured under a Container and Chassis Insurance Policy issued by defendant American Motorists Insurance Company ("American Motorists"). Atlantic claims that the American Motorists policy covers the risks of "physical loss or damage...from any external cause..." to cargo containers and chassis owned by or leased to Atlantic; that while the policy was in effect Atlantic sustained physical losses of and damage to certain insured cargo containers and chassis which it had leased from others; that as a result of such physical losses and damage Atlantic became obligated to and did pay its lessors the depreciated value of the missing equipment or the repair costs of damaged equipment; and that American Motorists has failed and wrongfully refused to reimburse Atlantic for the amount of such payments.

The claim as to the liability of American Motorists was submitted to the District Court on agreed statements of facts, and on the basis of several exhibits which were received by the Court. By stipulation of the parties, made at the invitation of and adopted by the Court, the deposition of the General Manager of the Container Division of Atlantic's agent in New York, together with related exhibits marked during the course of the deposition, were considered by the

Court in deciding the case.

In a decision dated February 3, 1976, the District Court concluded that "the contract clause in dispute is termed an 'all risks' clause," (182a) that, "the coverage for 'physical loss or damage' does contemplate coverage for loss as well as damage" to the insured containers and chassis, (181a) and that the insurance contract issued to Atlantic covers the risks claimed.

The District Court considered the system of perpetual inventory control utilized by Atlantic and found that "Atlantic's claim that the equipment is lost is persuasive." (183a)

Despite its conclusions, the District Court nevertheless dismissed the complaint in its entirety and denied recovery to Atlantic on the asserted basis that Atlantic had failed to sustain its burden of proving that the losses which were sustained and which were covered by the "all risks" policy were fortuitous. (183a - 184a) The Court expressed its belief that under an "all risks" policy, "a party normally demonstrates that a loss was fortuitous by proving the cause of its absence." (184a)

In dismissing the complaint the District Court apparently did not consider that in its brief American Motorists conceded liability to the plaintiff for the cost

of repairs paid by Atlantic on account of damages to chassis No. TLCC 30046 for which claim is made; and apparently did not consider that the parties had stipulated that chassis No. TLCC 30018 for which claim is made was found abandoned in a vacant lot in New Jersey with its identification obliterated, two years after Atlantic had reported its loss from the pier and had paid its lessor the depreciated value thereof.

THE FACTS

Beginning in April, 1971 Atlantic leased approximately 700 pieces of equipment (121a) including chassis and containers to use on board two container vessels which Atlantic operated as a liner service between New York and various ports. The containers were leased from Sea Container Inc. (7a) and the chassis used in the operation were leased from International Transportation System Inc., and Ambey Corporation.(7a) In New York Atlantic maintained and stored the equipment at a terminal located at Pier foot of 23rd Street Brooklyn. (100a)

Atlantic insured itself against loss or damage to said cargo chassis and containers by purchasing Container and Chassis Policy No. OM 50082 (10a) from American Motorists. The policy contained a provision insuring Atlantic against the risks of "physical loss or damage to the property insured from any external cause..." (12a) The policy did not contain any provisions excluding coverage for unexplained loss,

mysterious disappearance or loss or shortage disclosed on taking inventory. The policy was in effect during all relevant periods herein (7a) and covers the equipment for which claim is made. (7a)

Atlantic maintains that it suffered a property loss (97a) of two leased containers, six leased chassis, and damages to one leased chassis within the meaning and coverage of its American Motorists Container and Chassis policy. The facts as to disclosure of loss, last recorded location of each piece of equipment, methods of perpetual inventory control, and independent external proof of loss were either stipulated by the parties or appear in the deposition of Atlantic by Ross Camardella which was submitted to the District Court, and may be summarized as follows:

Atlantic maintained a system of perpetual inventory control over the containers and chassis which it used in its liner service operation. (82a-97a) At the heart of the system was the Equipment Interchange Receipt and Inspection Report ("Interchange Receipt") (84a, 87a-88a) and the magnetic equipment control board. (88a, 161a) Equipment control boards were maintained at the pier and terminal (88a) used by Atlantic in Brooklyn and at the office of Chester, Blackburn & Roder, Atlantic's agent in Manhattan. (90a)

At the 23rd Street Pier no movement of any container or chassis into or out of the custody of Atlantic was permitted unless an interchange receipt was executed by both the delivering carrier and the receiving carrier. (84a, 139a-140a, 147a-149a, 151a-154a) When such a movement did occur it was immediately reflected on the equipment control board at the pier (88a-89a) where each piece of equipment was represented by a coded card which was moved to various slots on the board (89a) to reflect the changing disposition and status of the equipment. Copies of each interchange receipt were maintained both at the pier (87a) and at the office of Atlantic's agent in New York. (89a) At all times the equipment control board contained a visual representation of the location of each item of equipment controlled by the pier and its status. (88a-89a)

A master magnetic equipment control board was maintained at the office of Atlantic's agent in New York. (89a-91a) The master control board showed the location and status of every item of equipment used by Atlantic both on the pier and wherever located. (90a) Each morning the pier equipment control board was reconciled with the master equipment control board maintained by Atlantic's agent in Manhattan. (94a-95a) When a discrepancy existed between the two control boards a physical inventory was made at the pier. (97a) In addition to the above documentary and daily visual

inventory controls a physical inventory was taken at the pier every month. (95a-96a)

The success of the perpetual inventory control system is evidenced by the fact that of the 478 containers which were on lease to Atlantic during the period of its liner service, 476 were returned to Atlantic's lessor, the remaining two being the subject of this suit. (144a-146a)

Soon after termination of the liner service in October, 1972 (87a) pier personnel discovered the loss of the equipment which is the subject of this suit. Upon such discovery an immediate record check was conducted and physical inventories taken of all equipment at the pier. (97a-98a) Atlantic maintained separate files for each piece of equipment on lease to it (89a) and Mr. Camardella personally pulled and preserved from each such file the last interchange receipt for each item of equipment. (85a) According to said records of original entry, which are in evidence, (139a-140a, 147a-149a, 151a-154a) each of the missing pieces of equipment was in the custody and control of the pier at the time of the discovery of the loss.

Tracers were sent to all of Atlantic's agents and to all of the common carriers with which Atlantic dealt. (98a) After the results of these inquiries proved negative, and responses were obtained from every agent involved (98a) the police were notifed of the losses from the pier. (98a-99a,

101a, 102a, 141a, 142a, 163a, 168a)

The parties stipulated that chassis No. TLCC 30018 for which claim is made, was found abandoned in a vacant lot in New Jersey with its identification obliterated (172a), two years after Atlantic reported its loss from the pier and had paid its lessor the depreciated value thereof. (173a, 21a)

Chassis No. TLCC 30046, for which claim is made, was originally reported lost and subsequently returned to Atlantic stripped of its valuable parts (108a-116a, 170a-171a) and American Motorists has conceded its liability to Atlantic for the cost of repairs (Memorandum of Facts and Law in Opposition Submitted by Defendant, p. 5).

Attached as Appendix A to this brief is a schedule showing the identification of each piece of equipment for which claim is made, the date according to Atlantic's record when each was received into the custody of the pier prior to disclosure of loss therefrom, and the depreciated value paid by Atlantic to its lessors on acccunt of said loss or damage.

ARGUMENT

POINT I

ATLANTIC'S LOSS WAS WITHIN THE SCOPE OF COVERAGE OF THE INSURANCE POLICY.

The District Court correctly concluded that the loss incurred by Atlantic was within the broad scope of coverage set forth in The Container and Chassis Policy issued by American Motorists. (180a-182a) The Policy insured Atlantic against the risks of "physical loss or damage to the property insured...from any external cause except as excluded below"[1] (12a) and contained no exclusions for the perils of unexplained loss, mysterious disappearance, or loss or shortage disclosed on taking inventory.

As the District Court recognized, there is no merit to the suggestion made by American Motorists that the phrase "physical loss or damage to the property" should be read as providing coverage only for damage to the property, and not physical loss of the property. (184a) Any such construction would be in conflict with the very words set forth. Moreover, the same phrase has long been considered as an indicia of comprehensive "all risks" coverage and not as a limitation

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[1] Clause 7 of the Policy provides in pertinent part:

"COVERAGE AND DEDUCTIBLE 7. A. To pay for physical loss or damage to the property insured from any external cause except as excluded below.

* * * "

upon coverage. For example, in Jewelers Mutual Insurance Company v. Balogh, 272 F.2d 889, 891 (5th Cir. 1959), virtually the same phrase "...loss or damage to the above described property" was employed in the standardized jewelers block "all risks" policy there under consideration.

The meaning of the words "physical loss...to the property insured" is clear and not open to serious dispute. Due consideration of the purpose of the policy, the absence of any relevant exclusions, and the comprehensive language employed, compels the conclusion that Atlantic was insured against the losses which it incurred. The holding of the District Court that "the coverage 'for physical loss or damage' does contemplate coverage for loss as well as damage" (181a) to the insured containers and chassis was proper and should not be disturbed.

POINT II

ATLANTIC SUSTAINED ITS BURDEN OF PROVING THAT THE LOSS WAS FORTUITOUS

Despite its conclusions that "the contract clause in dispute is termed an 'all risks clause'" (182a) Redna Marine Corporation v. Poland, 48 F.R.D. 81 (SDNY 1969); Jewelers Mutual Insurance Company v. Balogh, supra; Betty v. Liverpool and London and Globe Insurance Company, 310 F.2d 308, (4th Cir. 1962), and that "Atlantic's claim that the equipment is lost in persuasive," (183a) the District Court nevertheless held that Atlantic had not sustained its burden of proving that its loss was fortuitous. The Court expressed its belief that under an 'all risks' policy, "a party normally demonstrates that a loss was fortuitous by proving the cause of its absence," (184a) and that "[i]n the present case there is no evidence at all on the subject." (184a) The standard of proof thus enunciated by the Court and imposed upon Atlantic was untenable as a matter of law and reversal is required on this ground alone.

In British and Foreign Marine Insurance Company, Limited v. Gaunt, [1921] 2 A.C. 41, 47, recently cited with approval by this Court in Northwestern Mutual Life Insurance v. Linard, 498 F.2d 556, 561 f.5 (2d Cir. 1974), the English House of Lords established the principle that a plaintiff who sues under an "all risks" policy must prove that the loss

was due to accident or casualty and he is not bound to go further and prove the exact nature of the accident or casualty which in fact occasioned his loss.

As Judge Mansfield stated in Redna Marine Corporation v. Poland, supra:

> "The policy in suit is an 'all risks' policy. Such a policy provides coverage which insures against any loss without putting upon the insured the burden of establishing that the loss was due to a peril falling within the policy's coverage. Although there may be exceptions to such coverage, as for a defect inherent in the subject of the insurance, it is incumbent upon the underwriter to demonstrate that the exception applies." Redna Marine Corporation v. Poland, 46 F.R.D. 81 (S.D.N.Y. 1969) at 86. See also Northwestern Mutual Life Insurance Co. v. Linard, supra.

"...All risk insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surrounded the disappearance of property." Betty v. Liverpool and London and Globe Insurance Co., supra at 311. Considering the nature of all risks insurance and its manifest purpose, it is well established that an insured such as Atlantic does not have to demonstrate the cause of its loss, Redna Marine Corporation v. Poland, supra, Jewelers Mutual Insurance Company v. Balogh, supra at 892; as, indeed, "such policies are used to cover risks of events too heterogeneous for exhaustive definition." Patterson, Essentials of Insurance Law, 239 (1957). The District Court erred as a matter of law in requiring Atlantic as an "all risks" insured to "demonstrate[s]

that a loss was fortuitous by proving the cause of its absence." (183a)

The plain provisions of the Policy insured against physical loss. Atlantic established such a loss, upon evidence which the District Court found to be persuasive. (183a) At that point the burden shifted to the insurer to go forward with any evidence to the contrary or to establish that an exceptive condition applied so as to permit it to escape the broad undertaking of its comprehensive cover. Redna Marine Corporation v. Poland, supra at p. 86 and Jewelers Mutual Insurance Company v. Balogh, supra at p. 892. The District Court was in error in failing to recognize that American Motorists did not sustain that burden.

Entirely apart from the erroneous allocation of proof which the District Court imposed upon Atlantic, the record is clear that Atlantic proved that its loss was fortuitous in any event. Atlantic established custody of equipment at the pier by submitting to the Court the last interchange receipt for each item for which claim is made. Atlantic established the approximate date of loss by reference to the termination of its liner service in October, 1972 and by reference to the perpetual inventory controls which it maintained. Atlantic even provided proof by stipulation signed by the underwriter of the ultimate fate of two chassis

found abandoned in vacant lots. (172a) Clearly Atlantic met its burden of proof; and the burden of establishing that the loss was due to a peril falling outside of the policy then shifted to American Motorists who produced no evidence whatsoever. Redna Marine Corporation v. Poland, supra. See Jewelers Mutual Insurance Company v. Balogh, supra.

The District Court's reliance upon this Court's decision in Northwestern Mutual Life Insurance Co. v. Linard, supra, is misplaced. In Linard, which was a scuttling case, this Court held that while the shipowner made a prima facie case that loss arose from a covered peril, the underwriters met their burden of going forward with evidence of scuttling, and that, accordingly, the finding of the District Court that the evidence was in equipoise as to whether the ship had been scuttled was not clearly erroneous. By contrast here Atlantic, as the insured, has made a prima facie case of loss, and American Motorists as underwriter has utterly failed to meet its burden of going forward and has produced no evidence at all.

Further, in Linard the Court specifically noted that it was not dealing with "...a so called all risks policy wherein all losses attributable to external causes are covered absent specific exclusion thereof." Id. at p. 561. To the

contrary in the instant case the District Court was dealing with such a policy.

CONCLUSION

For the foregoing reasons, the decision and order of the District Court dismissing plaintiff's complaint should be reversed and judgment entered for plaintiff as against defendant for the amount stated in the complaint.

May 19, 1976

Respectfully submitted,

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APPENDIX A

Container or Chassis I.D. No.	Date of Last Equipment Interchange Receipt into Pier	Claim for Relief
SCIU 407124-2	9-21-72 (139a)	$ 2,002
SCIU 407344-0	8-18-72 (140a)	2,002
ATLZ 162002	9-28-72 (147a)	2,333.34
ATLZ 162031	2-12-72 (149a)	2,333.34
ATLZ 104021	9-29-72 (148a)	2,298.70
TLCC 30003	10-30-72 (151a)	2,965.37
1)TLCC 30018	7-27-72 (152a)	2,986.70
TLCC 30030	3-30-72 (153a)	2,965.37
2)TLCC 30046 (repair)	9-15-72 (154a)	2,076.80
Total Claim for Relief		$21,963.62

1) Chassis found abandoned and stripped in New Jersey on November 27, 1974 long after Atlantic had paid its lessor. See Stipulation. (172a)

2) American Motorists concedes liability. See Memorandum of Facts and Law in Opposition submitted by defendant at p. 5.

Received by
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May 19, 1976

RG